No. 95-1184

In the Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondents do not appear to defend the court of appeals' holding that the imposition of an assessment on handlers "hamper[s]" respondents' own speech because it deprives them of money that they could otherwise spend on their own advertising endeavors. See Pet. App. 18a; see also Resp. C.A. Br. 11.[1] Respondents persist, however, in characterizing the generic advertising provisions

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[1] Insofar as the Wileman respondents may continue to pursue that line of argument (see Wileman Br. 49), we have explained (Gov't Br. 20-21) that the fact that the marketing order assessments diminish the amount of money that respondents might otherwise spend on other activities—including private advertising efforts—is constitutionally irrelevant.

of the Agricultural Marketing Agreement Act of 1937 (AMAA or Act), 7 U.S.C. 601 *et seq.*, and the Secretary's marketing orders as ones that "suppress[]" or "stifle" their speech. Gerawan Br. 20, 11; see also *id.* at 10-11, 18, 19, 42-44; Wileman Br. 34. As we demonstrate in our opening brief (Gov't Br. 20, 44-45), the generic advertising programs do not regulate, restrict, or suppress respondents' private advertising efforts; the AMAA expressly provides that "[n]o order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product." 7 U.S.C. 608c(10). Rather, *in addition to* the diverse commercial advertising that respondents and other individual handlers might choose to disseminate through private efforts, the marketing order provisions ensure that commercial advertising directed at increasing overall demand for the covered commodities—on behalf of growers, as well as handlers generally—also reaches the public.

The generic advertising programs thus do not impair the First Amendment interest in "the informational function of advertising." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) (citing *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978)). To the contrary, they substantially further that interest.[2] While the system of mandatory

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[2] The Gerawan respondents contend (Gerawan Br. 19) that the generic advertising programs "reduce [consumers'] access to information about the products that individual competitors would otherwise provide," and thereby "skew[] advertising in favor of more generic messages [and] necessarily decrease[] the relative share of advertising that focuses on differences between products within the advertised category." That reasoning is flawed. By providing for advertising that encourages consumption of the specified commodities generally, while allowing respondents to engage in whatever advertising they choose, the generic advertising programs employ "the remedy [of] more speech, not enforced silence," *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), to effectuate their objectives. Nor do the generic advertising programs penalize respondents for engaging in their own speech. Compare *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974) (invalidating Florida statute requiring newspapers to carry candidate's reply to attacks on candidate's character published by the paper). Any incidental difficulty that respondents experience in advancing their private commercial message does not implicate the First Amendment.

assessments for advertising on behalf of all growers and handlers covered by a particular marketing order may implicate First Amendment values (despite its commercial content) under decisions such as *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Keller* v. *State Bar of California*, 496 U.S. 1 (1990), it does not fall within the category of *restrictions* on commercial speech that this Court has addressed in *Central Hudson* and its progeny.

2. The Gerawan respondents contend that "[t]he *Abood* line of cases is easily distinguishable" because "[t]hose cases involved challenges to compulsory financial support of collective activities whose primary purpose was neither the suppression nor promotion of particular ideas—namely, the conduct of collective bargaining and the regulation of the legal profession." Gerawan Br. 37. That contention is incorrect. The regulatory framework established by the Act and the Secretary's marketing orders has the nonspeech-related purpose of establishing stable and orderly marketing conditions and enhancing returns to growers. See Gov't Br. 3, 26, 35. The Act and its enabling regulations establish an array of mechanisms designed to achieve that end, including minimum quality and maturity standards, grading and inspection requirements, production research, marketing research, and development projects. 7 U.S.C. 602(3). The generic

advertising activities that are at issue here are but one element of the "marketing research and development projects" authorized by Congress, 7 U.S.C. 608c(6)(I), and are part of a far broader regulatory system that does not principally concern speech.

Nor are the labor activities at issue in the union context less expressive or ideological in nature than are the promotional activities at issue here. Collective bargaining, contract administration, and grievance adjustment are inherently expressive endeavors. When union officials represent an employee in contract talks or grievance proceedings, for example, they necessarily engage in speech on the employee's behalf, funded in part by that employee's contributions. As this Court has recognized, moreover, a union's expressive activities on behalf of an employee frequently have an ideological component to which the employee may object. See, *e.g.*, *Abood*, 431 U.S. at 222-223; Gov't Br. 32-33 & nn. 20 & 21.[3] So long as those activities are germane to the union's statutory duties of collective bargaining, contract administration, and grievance adjustment, however, the First Amendment does not bar a system of compulsory employee contributions to support them. *Abood*, 431 U.S. at 232.

It follows a fortiori from *Abood* and related cases that the industry-funded advertising programs under agricultural marketing orders are constitutional. The advertising programs involve pure commercial speech, since they propose commercial transactions in commodities that respondents voluntarily offer for sale; the advertising is non-ideological in nature; it is part of a larger regulatory

[3] The same is true of integrated bar associations, which are responsible, among other things, for enforcing ethical standards for the legal profession. See *Keller* v. *State Bar of California*, 496 U.S. 1, 16 (1990).

framework that does not principally concern speech; and that regulatory framework (including its advertising program) is intended to benefit producers and the agricultural sector as a whole, not merely the handlers that pay the assessments. Nor does the "pro-consumption" message of generic advertisements meaningfully differ for present purposes from the "pro-labor" message of employee-funded union speech. Respondents offer no persuasive reason to depart from the well-established analytical framework for reviewing compulsory collective-payment arrangements.[4]

The Wileman respondents argue (Wileman Br. 43-45) that the reasoning of *Abood* rests solely on the principle of exclusive representation embodied in the labor laws. The Wileman respondents ignore, however, that the Court has applied *Abood*'s "germaneness" inquiry to the

[4] The Gerawan respondents incorrectly contend (Gerawan Br. 36) that this Court has rejected the application of *Abood* and related cases "[i]n analogous contexts." None of the cases that they cite involved compulsory financial contributions toward collective activities having an expressive component. See, *e.g.*, *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781 (1988) (state statute requiring fundraisers to, *inter alia*, disclose financial information to donors); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 633 (1943) (state regulation requiring children in public schools to salute the American flag); *Turner Broadcasting Sys., Inc.* v. *Federal Communications Comm'n*, 114 S. Ct. 2445 (1994) (federal statute requiring carriage of local broadcast stations on cable systems); *44 Liquormart, Inc.* v. *Rhode Island*, 116 S. Ct. 1495 (1996) (state statutes prohibiting advertisement of liquor prices); *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (federal statute prohibiting beer labels from displaying alcohol content). The Court has made clear that arrangements such as the one at issue here must be reviewed under the "germaneness" test. See Gov't Br. 18-19, 23-25. See also *Carroll* v. *Blinken*, 957 F.2d 991, 996-997, 999-1003 (2d Cir.) (applying *Abood* and its progeny to use of mandatory student activity fees to fund organization engaged in ideological activities), cert. denied, 506 U.S. 906 (1992).

integrated-bar setting, *Keller*, where attorney-members are free to speak out on questions involving "the quality of the legal service available to the people of the State," 496 U.S. at 14 (quoting *Lathrop* v. *Donohue*, 367 U.S. 820, 843 (1961) (plurality opinion)), notwithstanding their membership in the bar association. Moreover, by allowing private advertising by producers and handlers while ensuring that generic commercial advertising is disseminated, the programs at issue here are *less* restrictive of speech than are the "agency-shop" arrangements that this Court has upheld in prior cases.

3. The Gerawan respondents suggest (Gerawan Br. 15-16) that because generic advertising programs have not been utilized with respect to every commodity or region, their use can never be justified by important governmental objectives. The union and integrated-bar cases plainly refute that argument. Not all workplaces are unionized, nor has every State authorized an "agency shop" arrangement for its public employees.[5] See R. Theodore Clark, Jr., *A Guide to the Changing Court Rulings on Union Security in the Public Sector: A Management Perspective*, 14 J. L. & Educ. 71, 71 n.1 (1985) (identifying 20 States that had then adopted such arrangements). The Court nonetheless has held that compelled employee funding of union representation, where Congress or a State has found the need to provide for it, serves the important governmental interests in promoting labor peace and avoiding the risk of "free riders." See, *e.g.*, *Abood*, 431 U.S. at 222, 224; *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 778 (1961). The governmental interest, in other words, is in facilitating

[5] The National Labor Relations Act leaves regulation of the labor relations of state and local governments to the States. See 29 U.S.C. 152(2).

the activities of the union when the employees concerned have chosen to be represented by a union.

Similarly here, the governmental interest is in facilitating privately initiated activities under a marketing order when the producers concerned have chosen to be covered by one. Mandatory assessment obligations may arise only where there is supermajority support within the covered industry—a marketing order must generally be approved either by two-thirds of the producers of a commodity, or by the producers who market at least two-thirds of the volume of the commodity. 7 U.S.C. 608c(3)-(4), (8) and (9)(b).[6] This particularized process ensures that marketing order obligations—including assessments for generic advertising—extend no further than is necessary to serve the government's important policy objectives.[7]

[6] Frequently, as in this case, marketing orders are subject to periodic referenda, see 7 C.F.R. 917.61(e), and must be terminated if majority support within the industry no longer exists. See 7 C.F.R. 917.61(c). The Secretary must also terminate or suspend an order "whenever he finds that such provisions do not tend to effectuate the declared policy of the act." 7 C.F.R. 917.61(b). See also Gov't Br. 6 n.3 (Section 501(c) of the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 1031—enacted on April 4, 1996—requires commodity committees to fund periodic, independent evaluations of generic promotion programs, and to make the results available to the Secretary and to the public). The commodity committees recommend particular advertising expenditures to the Secretary by a majority vote, 7 C.F.R. 917.35, at meetings in which industry members may participate.

[7] As we have explained (Gov't Br. 45-48), distinctive marketing order characteristics, such as the allowance of credit for qualified private advertising in certain markets, are based on industry-specific conditions. Individual marketing orders for each industry are, in turn, fashioned and adopted through the rulemaking and industry-ratification processes described herein. To the extent that respondents seek to undermine the importance of the governmental interest by

We have demonstrated here (Gov't Br. 25-28, 35-42), that the challenged generic advertising programs serve important public interests in orderly marketing conditions and enhanced returns to growers, and that Congress's use of industry assessments represents a valid determination that mandatory financial participation, when approved by the requisite percentage of producers, will "distribute fairly the cost of these activities among those who benefit, and * * * counteract[] the incentive that [market participants] might otherwise have to become 'free riders.'" *Abood*, 431 U.S. at 222. Moreover, because it is both region-specific and commodity-specific, the marketing order framework is, in significant respects, more narrowly drawn to serve Congress's objectives than are the "agency shop" arrangements that the Court approved in *Abood* and related cases. Before a marketing order may be implemented in a particular industry, the Secretary of Agriculture must engage in formal rulemaking proceedings, 7 U.S.C. 608c(3)-(4), and craft an order precisely "designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production" of the covered commodity. 7 U.S.C. 608c(6)(I); 7 C.F.R. 916.45, 917.39. See, *e.g.*, 41 Fed. Reg. 14,377 (1976) (amending marketing order for peaches and pears) ("The evidence indicates that provisions for paid advertising activities for peaches and pears and vesting authority therefor in the Peach and Pear Commodity Committees would place the peach and pear industries in a better position to advance the interest of

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relying on the fact that the AMAA provides for generic advertising on a commodity-specific basis and therefore does not apply to all commodities (see Gerawan Br. 15-16), we note that Congress has now provided for generic advertising programs with respect to all regulated commodities. Federal Agriculture Improvement Reform Act of 1996, § 518(b), 110 Stat. 1043.

growers, and this would tend to effectuate provisions of the act and the order."); 36 Fed. Reg. 8735, 8736 (1971) (amending order for plums). The marketing orders that emerge from that process must be restricted "to the smallest regional production areas * * * practicable." 7 U.S.C. 608c(11)(B).

4. Respondents cite *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991), for the proposition that, in addition to being germane to an important governmental objective, the generic advertising activities must not "significantly add to the burdening of free speech." Gerawan Br. 38 (quoting *Lehnert*, 500 U.S. at 519); see also Gerawan Br. 41; Wileman Br. 44 n.31. That contention misreads *Lehnert*. There, the Court considered the constitutionality of employee-funded activities that were outside of the union's statutory duties as the representative of employees within the bargaining unit.[8] It was in that context that the Court required that the challenged activities "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." 500 U.S. at 519; see also *Ellis* v. *Railway Clerks*, 466 U.S. 435, 440 (1984) (considering the validity of charging to dissenting employees the costs of, *inter alia*, conventions, union publications, social activities, and "litigation not involving the negotiation of agreements or

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[8] The expenses at issue in *Lehnert* were attributable to the costs of:

> (1) lobbying and electoral politics; (2) bargaining, litigation, and other activities on behalf of persons not in petitioners' bargaining unit; (3) public-relations efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; and (6) preparation for a strike which, had it materialized, would have violated Michigan law.

500 U.S. at 514.

settlement of grievances"). The *Lehnert* plurality repeatedly affirmed that a union's speech in performance of its responsibilities in the areas of collective-bargaining, contract administration, and grievance adjustment need only be germane to the government's interests in labor peace and avoiding free riders—even insofar as that speech contains an ideological component. See, *e.g.*, *Lehnert*, 500 U.S. at 517 ("[A]n employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative."); *ibid.* ("[The union] cases make clear that expenses that are relevant or 'germane' to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees."); see also *id.* at 520 (union lobbying activities designed to obtain ratification of public employment contracts properly chargeable to dissenting employees); *Ellis*, 466 U.S. at 456. Because the assessments at issue here may be expended only toward activities designed to "promote the marketing, distribution, and consumption" of covered commodities, 7 U.S.C. 608c(6)(I), they are necessarily germane to Congress's important objectives.

5. Respondents mischaracterize the nature of the "free rider" problem that supports the use of mandatory assessments. See Gerawan Br. 40; Wileman Br. 25. As we explain in our opening brief (Gov't Br. 27-28), the free rider problem speaks not only to the concern that some participants will unfairly benefit from the collective efforts of others, but, more fundamentally, to the risk that important collective programs will collapse from lack of participation absent mandatory support. Accordingly, the fact that some entities outside of the covered class may benefit from a collective program does not detract from the urgency of the free rider problem. See,

e.g., *Lehnert*, 500 U.S. at 519, 522-524 (plurality) (rejecting the contention that dissenting employees may never be charged for a union's collective-bargaining activities on behalf of *another* bargaining unit).

In any event, respondents' fairness arguments are unavailing. The Gerawan respondents contend (Gerawan Br. 40-41) that fairness considerations underlying the "free rider" principle are disserved by the generic advertising programs because (1) handlers of the same commodities in regions not covered by an advertising program benefit from the program to which respondents contribute; and (2) producers also benefit from the programs. See also Wileman Br. 25, 45. As to the former contention, it requires no leap of imagination to understand why Georgia peach handlers, for example, do not benefit from advertisements for *California*-grown peaches, see, *e.g.*, J.A. 530 (DX 301(b)); J.A. 396 (DX 303), to the same extent that California peach handlers do. As to the latter contention, Congress concluded that the most practicable method of recovering the costs of administering all aspects of a marketing order is through assessments made against handlers, and the structure of the marketing orders contemplates that handlers will pass on to producers a significant portion of all assessments, whether used for advertising or for other purposes. Respondents offer no reason to doubt the validity of that basic economic assumption.

6. Respondents' contention (*e.g.*, Wileman Br. 7, 14-25) that the generic advertising programs are intended to convey the message that particular brands are superior to others is unfounded.[9] We demonstrate in our

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[9] Respondents rely extensively on findings by the administrative law judge (ALJ) that did not pertain to First Amendment claims and were expressly or implicitly rejected by the Judicial Officer (JO), the

opening brief that the generic advertising programs are intended to promote California tree fruits generally, in order to encourage overall consumption. See Gov't Br. 25-26, 36, 38-42. The record does not support respondents' claim of an illicit purpose behind the programs. The advertising materials produced by the Committees, moreover, clearly demonstrate their generic purpose.

For example, the television and radio advertisements to which respondents object (Wileman Br. 18) convey the desirability of the entire class of "California peaches, plums and nectarines." J.A. 396; see also J.A. 397-400, 530. The programs' extensive "point-of-sale," press, and educational materials are similarly all-inclusive. See, *e.g.*, Wileman II DX 382 (promotional materials, including brochure informing readers that "[n]early 500 varieties of peaches, plums and nectarines are shipped from April through November"); Wileman II DX 380 (press materials, including cover letter informing editors that "[o]ver 90% of all nectarines are grown in California, in over 150 varieties, from May though September"); Wileman II DX 383 (educational materials regarding California tree fruits generally). Those materials adhere precisely to the Committees' statutory mandate.

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district court, and the court of appeals in disposing of respondents' non-constitutional claims. See, *e.g.*, Gerawan Br. 3 & n.4, 5-9, 17 n.15, 19; Wileman Br. 19-21. As the district court observed, the JO's decision represents the final decision of the Secretary for purposes of judicial review, 7 U.S.C. 608c(15)(A); 7 C.F.R. 2.35, and "the reviewing court's deference is to the agency and not to the ALJ." Pet. App. 46a (citing *Stamper* v. *Secretary of Agriculture*, 722 F.2d 1483, 1486 (9th Cir. 1984)). The courts below properly rejected the ALJ findings on which respondents now seek to rely. See, *e.g.*, Pet. App. 46a n.4 (rejecting respondents' allegations of bias by the JO); compare Gerawan Br. 3 & n.4.

The Wileman respondents place great weight (Wileman Br. 19-20) on the "Varieties Brochures" produced by the Committees. See J.A. 531, 532. Those are charts made available to retailers that list the major varieties (not brands) that are available during specific time periods. Because the major varieties (such as Bartlett pears and Queen Ann plums) are highly available and are, as a group, produced by a vast majority of growers, the brochures benefit the overwhelming majority of growers in that respect, in addition to conveying the more general message that a wide variety of California tree fruit is available during the entire season. They are not intended, however, to promote particular *brands*. See Pet. App. 72a ("No advertising by specific brand is allowed."); see also Wileman II Tr. 4885 (Testimony of Jonathan Field) ("Those varieties [appearing in the Varieties Brochures] are the major varieties shipped, generally—we try to take varieties that cross over the breadth of the industry, not specific to any one handler."). In the rare instance in which, as in 1989, a proprietary variety packed by a single handler appeared on the chart (J.A. 531, 532), it was because that variety had achieved significant volume, irrespective of proprietary interests. See Wileman II Tr. 4888, 4885-4886.

Similarly, whenever visual advertising materials are used, some representative fruit must be selected. Such examples necessarily do not exemplify every attribute of every variety that is available on the market. There is no indication in this case, however, that the generic ads, viewed in the aggregate, convey the message that consumers should purchase certain brands or varieties of California tree fruits to the exclusion of others.[10] Fur-

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[10] There is also no merit to the Wileman respondents' contention (Wileman Br. 20-21) that the generic advertising programs "project[] a

ther, even if we assume, *arguendo*, that certain generic advertisements might be perceived by some to have an incidental message regarding distinctive fruit characteristics, that inadvertent effect would not invalidate the government's otherwise valid objectives. Congress reasonably could conclude that the similarities among varieties of a commodity (*e.g.*, peaches or nectarines) covered by a particular marketing order outweigh the differences among those varieties, and therefore justify quality control and other measures, including generic advertising, that stabilize and promote the market for the commodity as a whole. Such groupings do not raise independent First Amendment concerns, any more than do the determinations of what groups of employees will be included in a bargaining unit represented by a union that is supported by mandatory dues.

7. We demonstrate in our opening brief (Gov't Br. 18-24) that the *Central Hudson* test is inapplicable where, as here, mandatory assessments are used to fund collective activities having an expressive component. But even if respondents were correct that the *Central Hudson* test is applicable, we have established that the generic advertising programs satisfy that test.

a. Respondents cannot refute Congress's "commonsense judgment," *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993), that generic advertising of peaches, plums, and nectarines leads to increased consumption of those commodities, and has an attendant stabilizing effect on market conditions. See *Central Hud-*

particularized message that red nectarines * * * are better than other varieties." In the portion of the court of appeals' opinion that respondents cite for that proposition (Pet. App. 15a n.6), the court merely repeated respondents' allegations as to the existence of such a bias. Those allegations have no support in the record.

son, 447 U.S. at 569; *Posadas de Puerto Rico Assocs.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986).[11] Instead, respondents echo the court of appeals' flawed holding (Pet. App. 20a) that the generic advertising programs, to be constitutional, must be demonstrably *more* effective at increasing demand than is individual brand advertising. See, *e.g.*, Gerawan Br. 22; Wileman Br. 22. As we have explained (Gov't Br. 37-39), that holding misapprehends *Central Hudson*'s requirement that restrictions on commercial speech "directly advance[]" the governments substantial interests. 447 U.S. at 566.

Because the generic advertising programs do not restrict or supplant handlers' private advertising efforts, those efforts may continue irrespective of the challenged programs. See, *e.g.*, Pet. App. 39a ("[Respondents] concede they are presently advertising on their own."). The pertinent question under *Central Hudson* thus is whether the addition of a base level of generic advertisements to the diverse cacophony of private brand advertising significantly advances the government's important interest in establishing orderly market conditions through increased demand. We amply demonstrate in

[11] Respondents point to purported shortcomings of certain studies in the record that affirm the unremarkable conclusion that advertising a product leads to increased consumption of that product. See Wileman Br. 17, 22-23; Gerawan Br. 25-28. Respondents also point to purportedly adverse studies that are not in the record and were not considered by the courts below. See, *e.g.*, Gerawan Br. 18 n.17, 20 n.18, 22 n.19. The court of appeals, however, correctly concluded that the generic advertising programs "undoubtedly" have "increased peach and nectarine sales." Pet. App. 17a. See also *id.* at 20a ("the Secretary has demonstrated that advertising increases consumption of peaches and nectarines"). Respondents' methodological objecions to particular studies do not alter the strong evidence of causation in this case, nor do they justify the court of appeals' legal errors in analyzing that evidence. See Gov't Br. 29-32, 36-39.

our opening brief that that criterion is satisfied. See Gov't Br. 38-39.[12]

b. The Wileman respondents cite their various disagreements with the Committees' promotional strategies (Wileman Br. 26) as evidence that the generic advertising programs are "more extensive than is necessary," *Central Hudson*, 447 U.S. at 566, to serve the government's interests. *Central Hudson*, however, does not deprive the Committees of the flexibility necessary to operate their programs on a day-to-day basis. See Gov't Br. 43-44. This Court's decisions require "a fit that is not necessarily perfect, but reasonable." *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. 2371, 2380 (1995) (quoting *Board of Trustees of SUNY* v. *Fox*, 492 U.S. 469, 480 (1989)). Here, the challenged programs do not ban or restrict respondents' private speech, and they are precisely focused on the consumer demand that is essential to achieving the government's goals. The programs are "not broader than Congress reasonably could have determined to be necessary," *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 539 (1987), to accomplish its objectives. They therefore satisfy the third element of the *Central Hudson* test. See *Board of Trustees* v. *Fox*, 492 U.S. at 480.[13]

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[12] Respondents' arguments with respect to their economic interests reaffirm our position (Gov't Br. 38-42) that generic and brand advertising are not equally effective at advancing the government's objectives. See Wileman Br. 27 n.20 ("Respondents are not concerned with increasing demand 'across the industry.' They are interested in promoting their own product and increasing demand for their specific brand label.").

[13] As the Gerawan respondents acknowledge (Gerawan Br. 24 n.20), Congress has attempted to encourage voluntary collective marketing efforts by facilitating the formation of agricultural cooperatives. See, *e.g.*, 7 U.S.C. 610(b)(1); 12 U.S.C. 1141a(3). The

Contrary to the Gerawan respondents' suggestion (Gerawan Br. 32), a system consisting solely of subsidies to producers would not effectively achieve the government's regulatory objectives. As we explain in our opening brief (Gov't Br. 28), the AMAA's regulatory framework, including the generic advertising component, advances the broad economic goals of "maintain[ing] * * * orderly marketing conditions for agricultural commodities," 7 U.S.C. 602(1), and "promot[ing] the marketing, distribution, and consumption" of covered commodities, 7 U.S.C. 608c(6)(I). Promoting returns to producers[14] is but one element of those broader objectives.[15] While direct subsidies would serve the narrow goal of enhancing economic returns to producers, and are sometimes employed to influence agricultural economies, they are an artificial and temporary economic measure that cannot alone accomplish the AMAA's

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California tree fruit industry contains no cooperative that is large enough to obviate the need for assessment-funded generic advertising.

[14] The Gerawan respondents refer to this objective pejoratively as a desire to "enhanc[e] the economic interests of a favored subclass of producers." Gerawan Br. 15. The legislative history of the AMAA makes clear, however, that Congress's concern with the economic interests of farmers springs from their important role in the Nation's economy. See Gov't Br. 26; Pet. App. 89a.

[15] The Gerawan respondents err in suggesting (Gerawan Br. 19-21) that the government's interests in this case include purported secondary effects such as decreased consumption of commodities not covered by the marketing order. Even if the record supported the existence of such extraneous consequences—which it does not—the government need not refute every adverse effect of a challenged policy, so long as its articulated justifications are sufficiently important ones and are advanced by the challenged policy. Cf. *Florida Bar* v. *Went For It, Inc.*, 115 S. Ct. at 2376 (focus of *Central Hudson* inquiry is on "the precise interests put forward by the [government]") (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 768 (1993)).

broader goals of stable and orderly market conditions through sustained consumer demand. The generic advertising programs are crafted precisely to achieve those goals. [16]

8. The Gerawan respondents advance the extraordinary proposition (Gerawan Br. 41-42) that increasing consumer demand for commodities in order to stabilize economic conditions—an objective these respondents disparage as a desire "to manipulate consumer perceptions" (*id.* at 41)—is a "constitutionally invalid purpose" that subjects the marketing order provisions to strict scrutiny. This Court's decisions make clear that influencing consumer preferences and conduct is a permissible goal, and that provisions that pursue that goal through the regulation of commercial speech are not subject to strict scrutiny. See, *e.g.*, *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1591 (1995) (deeming "substantial" government's interest in dissuading consumers from purchasing beer based on its high alcohol content); *Posadas*, 478 U.S. at 341 (deeming "substantial" Puerto Rico's interest in "the reduction of demand for casino gambling by [its] residents"); *Florida Bar*, 115 S. Ct. at 2376 (deeming "substantial" Florida's interest in, *inter alia*, improving the public's perception of the legal profession).[17]

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[16] The possibility that Congress or a state legislature may address wages and other working conditions directly, through regulation, does not undermine the constitutionality of statutes that also provide for those subjects to be addressed by private ordering through a system of union representation supported by mandatory dues.

[17] In *44 Liquormart*, the principal opinion stated that "when a State *entirely prohibits* the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." 116 S. Ct. at 1507 (emphasis added). See also *id.* at 1515-1520 (Thomas, J., concurring in part and concurring in the judgment). That approach is inapposite here because the generic advertising programs entail no prohibition of speech, let alone a complete prohibition; there is no "paternalistic" attempt, *id.* at 1510, to shield the public from truthful information.

The Gerawan respondents assert (Gerawan Br. 43) that "[a]side from their commercial context," the generic advertising programs "ordinarily would entail strict scrutiny." Whatever the accuracy of that assertion, it has no relevance to this case because the speech at issue here is purely commercial. The Court has repeatedly recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 455-456 (1978); see also *Central Hudson*, 447 U.S. at 562. Accordingly, the Court has held that "[t]he Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Id.* at 562-563; *Fox*, 492 U.S. at 477; *Florida Bar*, 115 S. Ct. at 2375.

Nothing about the communication at issue here removes it from that "subordinate" category of expression, *Fox*, 492 U.S. at 2375. The agricultural transactions that are the focus of the AMAA have long been subject to extensive federal regulation, see *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Zuber* v. *Allen*, 396 U.S. 168, 174-176 (1969) (discussing federal regulation of commodity transactions prior to enactment of the AMAA), and the advertising at issue here plainly "propose[s] a commercial transaction." *Fox*, 492 U.S. at 473-474; *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The programs clearly are not subject to strict scrutiny.

9. For similar reasons, the Wileman respondents' contention (Wileman Br. 30) that mandatory assessments for generic advertising are "presumptively invalid" is also unavailing. The Court has upheld certain bans on commercial speech where such prohibitions directly advance substantial interests and are not more extensive than necessary to serve those interests. See, *e.g.*, *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 513 (1981) (upholding State's complete ban of off-site billboard advertising); *Florida Bar*, *supra* (upholding state bar rules that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident); *Edge Broadcasting Co.*, *supra* (upholding federal statutes prohibiting radio broadcast of lottery advertising by licensees in nonlottery States). The Court likewise has upheld, under the "germaneness" test, compelled contributions toward collective expression, even where that expression contained an ideological message with which the contributor strongly disagreed. *E.g.*, *Abood*, 431 U.S. at 222-223. There is no basis for respondents' contention that the generic advertising programs—which involve neither the suppression of speech nor the financial support of ideological expression—are "presumptively invalid" under the First Amendment.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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